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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL LOPEZ,

Defendant and Appellant.

H032986

(Monterey County

Super.Ct.No. SS071709)

A jury convicted the defendant herein, Daniel Lopez, of crimes connected with his assault on a fellow prison inmate. Defendant contends that the jury was improperly instructed on three enhancement allegations that accompanied the charges. He also contends that the trial court should not have reinstated those allegations after finding insufficient evidence of them and that the abstract of judgment must be amended to correct a clerical error.

We agree with defendant's first claim and will reverse the judgment with respect to the true findings on the three enhancement allegations. Our resolution of that claim renders moot the other two and we will not address them. In all other respects, we will affirm the judgment.

BACKGROUND

I. *Convictions and Sentence*

As stated, defendant's instructional error claim is dispositive of his appeal, and given the nature of that claim it is unnecessary to recite the facts.

A jury convicted defendant, a prison inmate, of assault with a deadly weapon by a prisoner (Pen. Code, § 4501)¹ and possession of a prohibited weapon by a prisoner, namely a sharp instrument (§ 4502, subd. (a)). The jury found true an allegation that the section 4501 charge constituted a serious felony within the meaning of section 1192.7, subdivision (c)(23), because defendant personally used a deadly or dangerous weapon. Of significance to our resolution of this appeal, the jury also found true allegations that defendant had a prior conviction that implicated the "Three Strikes" law and made him a second-strike offender subject to a doubling of his prison sentence (§ 1170.12, subd. (c)(1)) and two prior convictions that implicated section 667, subdivision (a), a habitual offender statute. Defendant received a sentence of 14 years' imprisonment.

DISCUSSION

I. *Failing to Instruct on Standard of Proof for Finding Allegations True*

Defendant challenges the trial court's failure to instruct the jury that the state bore the burden of proving the truth of certain enhancement allegations beyond a reasonable doubt. He claims violations of the due process guaranties contained in the Fifth and Fourteenth Amendments to the United States Constitution. Under United States Supreme Court precedent, we must reverse the judgment with regard to those three allegations.

A. *Relevant Proceedings*

On April 15, 2008, the jury found defendant guilty of the substantive offenses described herein and found true an allegation not at issue in this appeal, namely the

¹ All further statutory references are to the Penal Code.

personal-use allegation under section 1192.7, subdivision (c)(23). The jury returned its verdicts after being given various instructions, including the following ones.

“The defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove the defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt.

“Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt, because everything in life is open to some possible or imaginary doubt.

“In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal, and you must find him not guilty.”

Also, the trial court instructed:

“The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find the defendant not guilty.”

In addition, the trial court instructed:

“If you find the defendant guilty of the crime charged in Count 1, which is assault with a deadly weapon by a prisoner, you must then decide whether the People have proved the additional allegation that the defendant personally used a deadly or dangerous weapon during the commission of that crime.

“[¶] . . . [¶]

“The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find the allegation has not been proved.

“You have been given a verdict form for the additional allegation. If you reach a verdict on any additional allegation, complete the verdict form for that allegation.

“You’re going to be given three verdict forms. I know you can’t see these, but I’m going to read them to you.

“[¶] . . . [¶]

“If you find that the person is, that the defendant is guilty of Count 1, then you would address the issue of the special finding as to Count 1. And it says, ‘We the jury in the above-entitled case, find the defendant, Daniel Lopez, during the commission of the crime alleged in Count 1, did or did not personally use a deadly or dangerous weapon within the meaning of Penal Code [s]ection 1192.7[, subdivision] (c)(23).[’] There’s a line for the date, and a line for the foreperson.

“So if you find that he is guilty of Count 1, then you go to this special allegation for Count 1. If he is not guilty for Count 1, you would not go to the special allegation for Count 1, you leave it blank. All right?”²

After the jury returned verdicts on the substantive offenses and the “special allegation” not at issue in this appeal, the trial court adjourned court until the next day. On that day, April 16, 2008, the court considered motions, in discussions outside the jury’s presence, regarding the enhancement allegations at issue here. After ruling on them, the parties and court agreed that the allegations would be tried to the court. Defendant waived his right to have the jurors try the truth of the allegations, saying, “I don’t see the point of wasting their time anymore.” Suddenly, however, defense counsel

² The written instructions also contain a version of CALCRIM No. 103, but we could not locate any recitation of it by the trial court. The written instruction provided: “A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove each element of a crime and special allegation beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt.”

suggested that it would be just as easy to conduct a quick jury trial, and defendant changed his mind and said he would like a jury trial “if that’s easier.” The jurors were still impaneled and were standing by, so the court was able to order the jury to return to the courtroom.

When trial on the enhancement allegations commenced, a correctional case records analyst testified that documentary evidence showed that, in the prosecutor’s words, “a person named Daniel Lopez was convicted of crimes previously,” namely the prior offenses alleged against defendant. The testimony lasted perhaps two minutes.

There was no closing argument and the trial court instructed the jury on how to reach verdicts on the allegations at issue here. The court gave the instructions orally. It is unclear from the record whether it provided a written version of the substantive instruction on how to determine the truth of the three allegations, although the clerk’s transcript contains a written version. We quote the instructions in their entirety. The trial court stated:

“People have alleged that the defendant was previously convicted of other crimes. It has already been determined that the defendant is the person named in Exhibit No. 7. You must decide whether the evidence proves that the defendant was convicted of the alleged crimes. [¶] The People allege that the defendant has been convicted of a violation of assault with a firearm, Penal Code [section] 245[, subdivision] (a)(2), on or about June 2, 2004, in San Benito, Superior Court Case No. CR0301954. [¶] People also allege a different conviction as a violation of assault with a deadly weapon, a violation of Penal Code [section] 245[, subdivision] (a)(1), on July 7, 2004, San Benito Superior Court Case No. CR0400534. [¶] In deciding whether the People have proved the allegations, consider only the evidence presented in this proceeding. Do not consider your verdict or any evidence from the earlier part of the trial. [¶] You may not return a finding that the alleged conviction has or has not been proved unless all twelve of you agree on that finding.

“At this time the Court is going to, the bailiff having been previously sworn, ask you to take charge of the jury, have them retire to the jury deliberation room. [¶] We’ll provide you with three verdicts forms. They are entitled Verdict Form of the Jury Prior. They each describe a particular charge and date. One of them reads, ‘We the jury, sworn to try the above-entitled case, find the defendant, Daniel Lopez, was not or was on or about June 2, 2004, in the Superior Court of the State of California for the County of San Benito convicted of the crime of assault with a firearm in violation of [section] 245[, subdivision] (a)(2) of the Penal Code, within the meaning of Penal Code [s]ection 1170.2[, subdivision] (c)(1).[’] And there’s a line for the date, and a line for the foreperson of the jury to sign. Essentially it is the same format that the previous verdict forms that you saw. [¶] Then there is another one that addresses the issue of whether there was a prior conviction, was or was not a prior conviction in San Benito County on July 7, 2004, for the crime of Penal Code [section] 245[, subdivision] (a)(1), assault with a deadly weapon; and another one for the same listed crime of June 2, 2004, assault with a firearm in violation of Penal Code [section] 245[, subdivision] (a)(2) within the meaning of Penal Code [s]ection 667[, subdivision] (a)(1). [¶] So two of them essentially talk about the same date and event. One of them is a different day and a different charge. You will have these verdict forms and Exhibit No. 7 for you to use in your deliberations. [¶] Officer Kennedy, would you take charge of the jury and escort them to the jury room at this time. [¶] Court is in recess.”

The jury returned verdicts that the second strike allegation (§ 1170.12, subd. (c)(1)) and habitual-offender allegations (§ 667, subd. (a)) were true.

B. *Applicable Law and Analysis*

The outcome of this appeal hinges on how we view the applicable legal standard. In our view, defendant’s entitlement to relief turns on whether the trial court’s failure to instruct on the beyond-a-reasonable-doubt standard constituted structural error as opposed to trial error. “There is no question that the failure to instruct sua sponte on the

. . . prosecutor’s burden . . . was error. The only question is the prejudicial impact of the error.” (*People v. Crawford* (1997) 58 Cal.App.4th 815, 819.) That is so, however, only if prejudice analysis is permitted in the first place. If the court’s omission resulted in structural error, the error is not subject to prejudice analysis, and the People acknowledge, correctly (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280-282), that reversal is constitutionally compelled. If the court committed a trial error, by contrast, prejudice analysis would apply. We would then turn to the test of *Chapman v. California* (1967) 386 U.S. 18, 24, to determine whether it appears “ ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’ ” (*Neder v. United States* (1999) 527 U.S. 1, 15.)³

The analyses in *People v. Phillips* (1997) 59 Cal.App.4th 952, and *People v. Crawford*, *supra*, 58 Cal.App.4th 815, lead us to conclude that structural error occurred. We must reverse the judgment with regard to the three enhancement allegations that were the subjects of a defective trial on April 16, 2008, the second part of a bifurcated trial whose first component had ended on the previous day.

In *People v. Phillips*, *supra*, 59 Cal.App.4th 952, the trial court neglected to give, after the end of the evidentiary phase of trial, orally or in writing, the standard reasonable doubt instruction then in effect. (*Id.* at pp. 953-954; see *id.* at p. 956, fn. 2 [quoting section 1096 and referring to CALJIC No. 2.90].) The court had, however, mentioned the reasonable doubt burden-of-proof standard in predeliberation instructions other than the

³ *Neder* also phrased the standard as follows: “Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?” (*Neder v. United States*, *supra*, 527 U.S. at p. 18.) If “a reviewing court” “cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—it should not find the error harmless.” (*Id.* at p. 19.)

standard instruction (evidently CALJIC No. 2.90) that it omitted. In addition, it had mentioned the concept of reasonable doubt (though without defining the term) to the prospective jurors. (*Phillips*, at pp. 954, 955-956.) At least one of the instructions contained language setting forth basic beyond-a-reasonable-doubt burden of proof principles: “ ‘In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People *to prove beyond a reasonable doubt every essential element of the charge against him*. No lack of testimony on defendant’s part will make up for a failure of proof by the People so as to support a finding against him on any such essential element.’ (Italics added.)” (*Id.* at p. 955.)

The foregoing allusions to the need for proof beyond a reasonable doubt could not outweigh for the *Phillips* court the problem that “the trial court did not define reasonable doubt” or describe “the People’s burden to prove guilt beyond a reasonable doubt. The trial court’s omission constitutes a structural constitutional defect and compels reversal per se.” (*People v. Phillips*, *supra*, 59 Cal.App.4th at pp. 953-954; cf. *People v. Mayo* (2006) 140 Cal.App.4th 535, 548, fn. 13 [declining to decide whether defects of this type constitute structural or trial error].) *Phillips* rejected the People’s argument that the “omission neither deprived Phillips of his right to a jury trial nor constituted a structural defect in the framework of the trial. That is because [in the People’s view] the jury was instructed with a proper definition of reasonable doubt through argument of counsel and other instructions relating to reasonable doubt.” (*Phillips*, at p. 957.)

Similarly, in *People v. Crawford*, *supra*, 58 Cal.App.4th 815, the reviewing court was confronted with “the trial court’s failure to instruct on . . . the prosecution’s burden of proof beyond a reasonable doubt (CALJIC No. 2.90).” (*Id.* at p. 817.) Evidently through clerical error, CALJIC No. 2.90 was left out of the instructions packet and no one noticed. (*Id.* at p. 819 & fn. 2.) Similar to *Phillips*, the trial court in *Crawford* told the audience of prospective jurors that “ ‘this is a criminal case. In a criminal case the

defendant, under our constitutional system, is presumed to be innocent until the contrary is proved. And in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. The effect of this presumption is only to place upon the State the burden of proving him guilty beyond a reasonable doubt, which I'll define for you. [¶] It's not a mere possible doubt. Because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.' ” (*Id.* at p. 820, fn. omitted.) And as in *Phillips*, the impaneled jury in *Crawford* heard reasonable doubt defined in other instructions. (*Ibid.*)

Nevertheless, *Crawford* held that structural error occurred in the court's failure to give CALJIC No. 2.90. The decision noted that in a concurring opinion in *Sullivan v. Louisiana*, *supra*, 508 U.S. 275, then Chief Justice Rehnquist had “expressed concern that the [*Sullivan*] majority may have painted with too broad a brush. He noted the instances where the court had applied harmless error analysis to instructional error and he suggested that the deficiency in *Sullivan* in many respects bore the hallmark of an error that is amenable to harmless-error analysis. The Chief Justice added: ‘In this regard, a trial in which a *deficient* reasonable-doubt instruction is given seems to me to be quite different from one in which no reasonable-doubt instruction is given at all.’ [Citation.] [Italics added in *Crawford*.] Nevertheless, the Chief Justice accepted the majority's conclusion that a constitutionally deficient *reasonable doubt instruction* ‘is a breed apart from the many other instructional errors that we have held *are* amenable to harmless-error analysis.’ [Citation.]” (*People v. Crawford, supra*, 58 Cal.App.4th at p. 822.)

Crawford then concluded: “In our view, *Sullivan* compels the conclusion that the trial court, in the case before us, erred in failing to instruct, *after presentation of the evidence*, on the requirement of proof beyond a reasonable doubt and in failing to assign the burden of proof to the prosecution, in effect denying to appellant the most elementary

and fundamental right provided by our system of justice, a jury verdict of guilty beyond a reasonable doubt.” (*People v. Crawford*, *supra*, 58 Cal.App.4th at pp. 822-823, italics added.) The decision rejected the People’s arguments that “that the giving of a reasonable doubt instruction during jury selection and not repeating it at the conclusion of the case does not constitute a ‘misdirection of the burden of proof’ or a ‘structural defect’ ” and that “the trial court’s failure to reiterate that instruction at the conclusion of trial violated [only] state procedural rules” if even that much. (*Id.* at p. 823.)

Conversely, *People v. Chatman* (2006) 38 Cal.4th 344, found only harmless trial error in the trial court’s failure to provide, at the penalty phase of a capital trial, the definition of reasonable doubt it had provided at the guilt phase. The court had instructed the jury on the correct burden of proof both at the guilt and penalty phases, omitting only, at the penalty phase, to define once again the meaning of reasonable doubt. “The trial court correctly instructed that before a juror could consider any criminal act in aggravation that ‘juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit such criminal acts.’ [Citation.] It did not define reasonable doubt as part of its penalty instructions, although it had done so at the guilt phase.” (*Id.* at pp. 407-408.) Under those circumstances, the court did not address the possibility of structural error (perhaps the defendant had not made such a claim), reviewed the claim for prejudice, and found none. (*Ibid.*)

The circumstances of this case hew closer to those of *People v. Phillips*, *supra*, 59 Cal.App.4th 952, and *People v. Crawford*, *supra*, 58 Cal.App.4th 815, than to those of *People v. Chatman*, *supra*, 38 Cal.4th 344. As the People remind us, the jury heard multiple references to the correct burden of proof. But in each such case, similar to *Phillips* and *Crawford*, the trial court’s reasonable doubt instructions were not connected to the question before the jury: was it true beyond a reasonable doubt that defendant had committed prior violations of section 245 that constituted two serious felonies and a strike prior under the relevant recidivism statutes?

Additional circumstances support our conclusion that defendant is entitled to relief. “ ‘When reviewing a supposedly ambiguous [i.e., potentially misleading] jury instruction, “ ‘we inquire “whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way” that violates the Constitution.’ ” ’ ” (*People v. Ayala* (2000) 24 Cal.4th 243, 289.) There was an overnight break between the first and second parts of the bifurcated trial. The formalities of taking the verdict on the substantive offenses and the special allegation not at issue here occurred on the prior day. (Cf. *People v. Flores* (2007) 147 Cal.App.4th 199, 206 [contrasting a case in which “a *full* instruction on the reasonable doubt standard of proof (i.e., CALJIC No. 2.90) was given during jury selection which occurred on the *same day* as the trial and jury deliberations”].) Thereafter, when the jury returned for the trial on the three remaining allegations, the court instructed, “*Do not consider your verdict* or any evidence from the earlier part of the trial.” (Italics added.) A reasonable likelihood exists that the jury understood this instruction to order it, in essence, to start afresh, and not consider the prior instructions—for it was those prior instructions, including instructions setting forth the beyond-a-reasonable-doubt burden of proof standard, that formed the basis for the prior verdict the court was telling the jury to disregard. The instructions pertaining to the three recidivist allegations, by contrast, contained no reference to any identifiable burden of proof beyond one lone vague reference suggesting that the People bore some kind of undefined burden of proof on their truth.

This reasonable likelihood of constitutional infirmity is bolstered by the language of the prior reasonable-doubt instructions themselves. They restricted application of the burden of proof to judging whether it was “the defendant who committed *the crime*” (italics added) and assessing the truth of “the additional allegation that the defendant personally used a deadly or dangerous weapon during the commission of that crime,” not to the three recidivism enhancements at issue in the second part of the bifurcated trial.

Finally, we address criticism of *People v. Phillips*, *supra*, 59 Cal.App.4th 952, and *People v. Crawford*, *supra*, 58 Cal.App.4th 815, that we discovered in the course of our research. In *People v. Flores*, *supra*, 147 Cal.App.4th 199, the majority declined to follow those decisions. The *Flores* majority criticized their analyses as not deferring sufficiently to United States Supreme Court, California Supreme Court, and California Court of Appeal decisions predating *Neder v. United States*, *supra*, 527 U.S. 1, and *Sullivan v. Louisiana*, *supra*, 508 U.S. 275. (See generally *Flores*, at pp. 208-211.)

To the extent that the discussion set forth by the *Flores* majority applies to defendant's claim (see *People v. Flores*, *supra*, 147 Cal.App.4th at pp. 203, 209-211), we generally do not agree with the greater part of it; rather, we agree generally with the concurrence and dissent in *Flores*, which endorsed *Phillips* and *Crawford* (*Flores*, at pp. 219-223 (conc. & dis. opn. of McDonald, J.)), to the extent the separate opinion's discussion is concerned with the issue before us. We will not belabor our analysis of *Flores*. Suffice it to say that the discussions in *Phillips* and *Crawford* of the rules on review of trial courts' failures to instruct on reasonable doubt are well-grounded in recent United States Supreme Court decisions, and to any extent that those United States Supreme Court decisions may be at variance from prior precedent, the more recent decisions of the United States Supreme Court properly apply to our resolution of this case.

DISPOSITION

The judgment is reversed with respect to the true findings on the three recidivist enhancement allegations, namely those finding true that defendant was convicted of violations of Penal Code section 245 that constituted prior serious felonies under Penal Code section 667, subdivision (a), and a prior strike under Penal Code section 1170.12, subdivision (c)(1). In all other respects, the judgment is affirmed.

Duffy, J.

WE CONCUR:

Rushing, P. J.

McAdams, J.